

FEDERAL COURT OF AUSTRALIA

Singh v Minister for Immigration and Border Protection [2017] FCA 304

Appeal from:	<i>Singh v Minister for Immigration & Anor</i> [2016] FCCA 2944
File number:	VID 1289 of 2016
Judge:	MOSHINSKY J
Date of judgment:	24 March 2017
Catchwords:	MIGRATION – skilled visa – where Tribunal found that appellant did not meet public interest criteria – whether jurisdictional error by Tribunal – jurisdictional error not established
Legislation:	<i>Migration Act 1958</i> (Cth), s 5(1) <i>Migration Regulations 1994</i> (Cth), Sch 2, cl 885.224
Date of hearing:	20 March 2017
Registry:	Victoria
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	20
Counsel for the Appellant:	The appellant appeared in person
Counsel for the First Respondent:	Mr L Brown
Solicitor for the First Respondent:	Clayton Utz
Counsel for the Second Respondent:	The second respondent filed a submitting notice, save as to costs

ORDERS

VID 1289 of 2016

BETWEEN: **BIKRAMJIT SINGH**
 Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGE: **MOSHINSKY J**

DATE OF ORDER: **24 MARCH 2017**

THE COURT ORDERS THAT:

1. 1. The appeal be dismissed.
2. 2. The appellant pay the first respondent's costs of the proceeding, to be taxed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MOSHINSKY J:

1 The appellant, a citizen of India, applied for a Skilled (Independent) (Class VB) (Subclass 885) visa on 11 October 2011. In connection with that application the appellant (through his migration agent) provided an International English Language Testing System (**IELTS**) Test Report Form indicating that he had undertaken an English language test on 25 August 2011 and setting out his results (the **Test Report Form**).

2 Subsequently, the Department of Immigration and Border Protection compared the photograph on the Test Report Form with a photograph recorded on a central database maintained by IELTS as part of its online verification system. After comparison of the Test Report Form provided by the appellant with the IELTS central database, the Department formed the view that the photographs did not match. Accordingly, the Department was not satisfied that the individual who presented and completed the IELTS test on 25 August 2011 was the appellant.

3 On 4 April 2014, the Department wrote to the appellant inviting him to comment on these matters.

4 On 30 April 2014, the appellant responded, denying that he had provided false or misleading information.

5 On 6 May 2014, a delegate of the first respondent (the **Minister**) decided to refuse the appellant's application for the visa. The delegate was not satisfied that the appellant met the requirements of Public Interest Criterion 4020 (**PIC 4020**) which was a requirement under cl 885.224 of Sch 2 to the *Migration Regulations 1994* (Cth).

6 It is convenient at this point to set out the relevant parts of PIC 4020. It provided as follows:

- (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
 - (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.

...

- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is false or misleading in a material particular** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

7 7 The expression “bogus document” was defined in s 5(1) of the *Migration Act 1958* (Cth) as follows:

- (1) In this Act, unless the contrary intention appears:
- ...
- bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

8 8 The delegate was not satisfied that the appellant met PIC 4020(1). As a consequence, the delegate concluded that the appellant did not meet cl 885.224.

9 9 The appellant applied to the Migration Review Tribunal (the **Tribunal**) (now the Administrative Appeals Tribunal) for review of the delegate’s decision.

10 10 On 17 April 2015, the Tribunal gave an oral decision, affirming the delegate’s decision. Written reasons for the decision were provided on 30 April 2015 (the **Tribunal decision**). In relation to the Tribunal decision, I note the following:

- (a) (a) The Tribunal referred to the hearing before the Tribunal which had taken place on 17 April 2015. The Tribunal outlined (at [6]) that it had indicated the following matters to the appellant at the hearing:
- It would be considering whether the IELTS test result, dated 25 August 2011, that the applicant submitted to the Department in relation to his visa application is a bogus document;

- - It had compared the photo of the person who sat the IELTS test, as recorded on the IELTS TRF Verification Service, with the photo attached to the IELTS test result the applicant submitted to the Department, as well as 2 photos the applicant had submitted to the Department in relation to the visa application, and the Tribunal's preliminary view was that someone other than the applicant sat the IELTS test;
 - The IELTS test result may be a bogus document because it was obtained because of a false or misleading statement, namely the person who took the test falsely declared that they were the applicant. If the Tribunal found the IELTS test result is a bogus document the applicant would not meet PIC 4020(1).
- (b) (b) The Tribunal stated (at [7]) that: it handed the appellant the four photographs referred to above and gave him an opportunity to examine them; after doing so, the appellant "said that he could see it was not him in the photograph on the IELTS TRF Verification Service test result"; the appellant said that he went to India for two months because his father had died and, while he was there, he sat an IELTS test on 28 July 2011; he said that, although "it was close", he did not get the required score, so he sat another IELTS test on 25 August 2011 before returning to Australia on 14 September 2011; he said that he did not know what had happened with his photograph and "he was shocked when he found out it did not match" and he "has no idea how this happened but it might be an error because IELTS has a large database".
- (c) (c) The Tribunal stated (at [8]) that the appellant was asked if he wanted to submit anything in relation to PIC 4020(4) (the requirements of which the Tribunal explained) and that he indicated that he had nothing to say in this regard.
- (d) (d) The Tribunal identified (at [12]) that the issue on the review was whether the appellant met PIC 4020 as required by cl 885.224 of the *Migration Regulations*. The Tribunal set out the requirements of PIC 4020 (Tribunal decision, [12]).
- (e) (e) The Tribunal then addressed the question whether (as referred to in PIC 4020) the appellant had given, or caused to be given, a "bogus document" or information that was "false or misleading in a material particular" at [14]-[21] of the decision. The Tribunal referred to the definition of "information

that is false or misleading in a material particular” in PIC 4020(5) of the *Migration Regulations* and the definition of “bogus document” in s 5(1) of the *Migration Act*. The Tribunal noted that the definition of “bogus document” does not require a conclusive finding of fact; rather, it is sufficient that the Tribunal “reasonably suspects” the document to have certain characteristics. The full definition of “bogus document” was attached to the Tribunal decision. The Tribunal’s key reasoning on this issue was set out at [18]-[20] of its decision. Having noted the appellant’s concession that the photograph of the candidate the IELTS Verification Service recorded as having sat the test was not him, and his suggestion that this might be an error because the IELTS database was large, the Tribunal said (at [18]):

[I]n the absence of any sort of credible explanation from the applicant as to how this could possibly have occurred, the Tribunal considers a much more plausible explanation is that an imposter engaged by the applicant sat the test, not the applicant.

- (f) (f) The Tribunal found that the Test Report Form was a “bogus document” in that the Tribunal reasonably suspected that it was obtained because of a false or misleading statement, namely that the person who took the test falsely and intentionally declared that they were the appellant (Tribunal decision, [19]). Accordingly, it was held that the appellant did not meet PIC 4020(1) (Tribunal decision, [21]).
- (g) (g) The Tribunal considered whether the requirements of PIC 4020(1) should be waived and decided that they should not be waived (Tribunal decision, [23]).

11 11 The appellant applied to the Federal Circuit Court of Australia for judicial review of the Tribunal’s decision.

12 12 On 11 October 2016, a hearing took place in the Federal Circuit Court. The appellant represented himself. The application was dismissed that day, with the primary judge giving *ex tempore* reasons for judgment (the **Reasons**). The primary judge concluded that no jurisdictional error had been shown in the Tribunal’s decision and the appellant was in effect seeking to engage the Court in a process of merits review, which was not permissible (see *Reasons*, [22]). In reaching this conclusion, the primary judge was satisfied that, on the evidence and information before the Tribunal, it was open to the Tribunal to make the finding at [18] of the Tribunal decision (set out above) (see the *Reasons*, [17]).

13 13 The appellant appeals to this Court from the decision of the Federal Circuit Court. The notice of appeal sets out five grounds of appeal which are in the following terms (without correction):

1. The learned judge and the respondents erred in law in finding that the appellant had submitted genuine documents in support of his visa application.
2. Further the appellant had been denied justice as the case was genuine and appellant had always been truthful.
3. The reasons for the decision are not valid and therefore the appellant wants to have these false allegations removed and the decision to be corrected. Appellant had applied for a review application with the Administrative Appeals Tribunal then at the Federal Circuit Court and now appellant is submitting an Appeal application.
4. The learned judge and the respondents erred in law and in fact in finding that there has been an error in the decision making process. The reason provided is not true and the appellant believes that no false or misleading documents were submitted to the department. The Appellant had undertaken the English Language (IELTS) test and had achieved the score provided honestly and fairly.
5. The appellant confirms that the IELTS document in question in the cases was a true and a correct reflection of the appellants performance at the IELTS examination which the appellant had undertaken.

14 14 The appellant represented himself at the hearing in this Court. He did not provide any written submissions. He made brief oral submissions to the effect that: he genuinely sat the IELTS English language test; he received the Test Report Form (AB101 and AB185) in the mail; he provided this to the Department; and he does not know where or how the mistake occurred.

15 15 For the following reasons, the appellant has not established error by the primary judge or jurisdictional error by the Tribunal.

16 16 The appellant, through his notice of appeal and oral submissions, maintains the challenge to the Tribunal's factual findings that he made before the primary judge. In substance, he argues that the primary judge was wrong to conclude that the Tribunal's factual findings were open to it on the evidence that was before it.

17 17 The task of assessing the material and making findings of fact for the purpose of its review is entrusted to the Tribunal and is generally not amenable to judicial review. The weight to be given to evidence is generally a matter for the Tribunal in the course of its fact-finding function.

18 18 In this case, the Tribunal had regard to the appellant's evidence that he had sat the IELTS test and that there must be an error in the IELTS database for it to show a photograph that was not of him (see Tribunal decision, [18]). However, the Tribunal did not accept that explanation (see the passage from [18] of the Tribunal decision set out above).

19 19 It was open to the Tribunal to conclude that, in the circumstances, it *reasonably suspected* that the Test Report Form was a document that was obtained because of a false or misleading statement, and therefore that the Test Report Form was a "bogus document" as defined in s 5(1) of the *Migration Act*.

20 20 Accordingly, the appeal is to be dismissed. Both parties accepted that costs should follow the event. There will, therefore, be an order that the appellant pay the Minister's costs of the proceeding.

I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Moshinsky.

Associate:

Dated: 24 March 2017